Lim Bee Cheng v Christopher Lee Joo Peng

HIGH COURT (PENANG) — DIVORCE PETITION NO 47-149-1988
VINCENT NG J
30 NOVEMBER 1995

Family Law *— Matrimonial property — Division of property — Marriage dissolved — Claim for half share in the matrimonial home — Whether property jointly acquired — Extent of contributions by wife to the welfare of the family — Court's discretion in dividing property — Factors to be considered — Law Reform (Marriage and Divorce) Act 1976 s 76(1), (2), (3) & (4)*

Family Law *— Matrimonial property — Division of property — Whether matrimonial home intended to be a gift during wedding*

In her divorce petition, the petitioner prayed for an order under s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') that the respondent transfer his half undivided share of the matrimonial home ('the said property') to the petitioner, the other half undivided share of the said property being already in the petitioner's name. The petitioner and the respondent were married on 29 April 1975. Differences arose in the marriage and the parties were legally separated under an order for judicial separation dated 26 February 1979. A divorce decree nisi was later granted by the High Court on 21 June 1990 under this petition and was made final and absolute on 21 September 1990. The said property was purchased by the respondent in December 1973 for a total purchase price of RM47,000. On 3 February 1975 the name of the petitioner was included as co-owner. In addition to the initial down payment and the monthly instalments totalling RM55,603.86, the respondent also expended a sum of RM20,458.98 on legal fees, assessments, fixtures and improvements and assorted movables. The petitioner on the other hand had, since 1980, paid the quit rents and assessment on the said property and had, in August 1990, expended a sum of RM47,094.06 towards the redemption of the said property following action by Peninsula Mortgage Bhd to auction off the property. The petitioner also maintained that she had paid certain mortgage instalments in cash on the property covered by ten receipts in the petitioner's custody. The receipts were in the name of the respondent. The respondent testified that all the said ten instalments were paid for from his own funds and resources. The respondent prayed that the said property be sold and the proceeds of sale be divided with 70% for the respondent and the balance to the petitioner. The petitioner also alleged that she was entitled to a greater proportion of the said property on the basis of the respondent's conduct. Furthermore the petitioner contended that the respondent gave her a half share of the property as a wedding gift when they had married. The respondent acknowledged that he was willing to accept an equality of division of the said property provided that no account was taken of the amount expended by the petitioner on the redemption of the said property. The petitioner together with the child of the marriage had been in sole occupation of the property since late 1977, and the child of the marriage is no longer a minor. The court had to consider having regard to the

statutory framework provided by the Act, how the said property was to be apportioned between the parties. A

Held:

(1) It was the respondent who paid the instalments on the property from his own funds and resources and there had never been any reimbursements by the petitioner to the respondent in respect of any of the said ten instalments (see p 41A–B). B

(2) Considering the dearth of evidence on any tangible contribution by the petitioner towards the acquisition of the property, the said property was acquired during the marriage by the sole efforts of the respondent (see p 41D–E). C

(3) There was no reason for the court to reject the respondent's explanation that the half undivided share of the said property currently registered under the petitioner's name was not intended to be a wedding gift. Therefore the contention of the petitioner that the half share of the said property was intended as a wedding gift was misconceived and without merit, given that it was not pleaded in the petition (see p 41F–H). D

(4) In any event, even if the court accepted the petitioner's contention, it nevertheless could not displace the discretion of the court be it under s 76(2) or (4) of the Act (see p 42C). E

(5) Under s 76(4) of the Act, if the finding was that the said property was acquired through the sole efforts of the respondent, it was mandatory that the court should give to the respondent a greater proportion of the said property. In the instant case, the apportionment of the said property had to be determined under s 76(3) of the Act and the court had no discretion but to make the apportionment strictly in accordance with s 76(4) of the Act (see p 43A–B). Accordingly, it would follow that the petitioner's entitlement to a share of the matrimonial home or the proceeds of sale under s 76(3) and (4) of the Act could not in law be equal to or greater in proportion than the respondent's entitlement (see pp 43G–44C). F G

(6) Notwithstanding the decision of the court to favour the respondent with a greater proportion of the said property even though the title was registered in the joint name of the respondent and petitioner in equal share, the court may still in the interest of justice exercise its discretion within the framework of s 76(3) and (4) of the Act to confirm such registered status quo in view of the respondent's concession herein (see p 45G–H). H

Per curiam: I

(1) When dealing with an application under s 76 the Act, it was essential for the court to make a finding of fact on whether the said property was acquired by the joint efforts of the petitioner and respondent, and if so, to apply s 76(1) and (2) of the Act; or whether the said property was acquired by the respondent by his sole effort, and if so, to apply s 76(3) and (4) of the Act (see p 40G–H).

(2) It was axiomatic that if the court was required, in the exercise of its powers under s 76(1) and (3) of the Act, to have regard to considerations under s 76(2) and (4) of the Act, then the facts relied on had to be provided with sufficient particularity in Form 2, as the opposite party was entitled to know the precise nature of the pleaded case that he or she had to meet (see p 42B).

[Bahasa Malaysia summary

Dalam petisyen perceraiannya, pempetisyen telah memohon untuk suatu perintah di bawah s 76 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') supaya penentang memindahmilik kepada pempetisyen separuh milikan tak terbahagi kediaman suami-isteri ('harta tersebut') yang merupakan kepunyaan penentang, yang separuh lagi milikan tak terbahagi harta tersebut sudahpun dalam nama pempetisyen. Kedua-dua pihak telah berkahwin pada 29 April 1975. Perselisihan telah timbul dalam perkahwinan tersebut dan pihak-pihak tersebut telah berpisah dari segi undang-undang di bawah suatu perintah pemisahan kehakiman bertarikh 26 Februari 1979. Suatu dekri nisi perceraian kemudiannya telah diperintahkah oleh Mahkamah Tinggi pada 21 Jun 1990 di bawah petisyen ini dan ianya dijadikan mutlak dan muktamad pada 21 September 1990. Harta tersebut dibeli oleh penentang pada Disember 1973 pada harga pembelian sejumlah RM47,000. Pada 3 Februari 1975 nama pempetisyen telah dimasukkan sebagai pemilik bersama. Selain daripada bayaran pendahuluan dan bayaran ansuran bulanan yang berjumlah RM55,603.86, penentang juga telah membelanjakan RM20,458.98 untuk kos guaman, taksiran, lekapan dan pembaikan serta pembelian pelbagai harta alih. Sejak 1980, pempetisyen pula telah membayar cukai tanah dan taksiran terhadap harta tersebut dan pada Ogos 1990, dia telah membelanjakan RM47,094.06 terhadap penebusan harta tersebut berikutan dengan tindakan yang diambil oleh Peninsula Mortgage Bhd untuk melelongkan harta tersebut. Pempetisyen juga telah berhujah bahawa dia telah membuat beberapa bayaran ansuran gadaian tersebut secara tunai terhadap harta tersebut yang diliputi oleh sepuluh keping resit dalam milikannya. Resit-resit tersebut adalah atas nama penentang. Penentang telah memberi keterangan bahawa kesemua sepuluh bayaran ansuran tersebut dibayar daripada punca kewangannya sendiri. Penentang telah memohon agar harta tersebut dijual dan hasil jualan dibahagikan dengan 70% kepada penentang dan bakinya kepada pempetisyen. Pempetisyen juga telah mendakwa bahawa ianya berhak kepada bahagian yang lebih besar harta tersebut berdasarkan kelakuan penentang. Tambahan pula pempetisyen telah berhujah bahawa ketika mereka berkahwin dahulu, penentang telah memberikannya separuh milikan tak terbahagi harta tersebut sebagai hadiah perkahwinan. Penentang telah mengesahkan bahawa dia bersedia untuk menerima pembahagian sama rata harta tersebut asalkan wang yang dibelanjakan oleh pempetisyen untuk menebus harta tersebut tidak diambil kira. Pempetisyen bersama-sama dengan anak hasil daripada perkahwinan mereka, telah menduduki harta tersebut sejak 1977, dan anak hasil daripada perkahwinan tersebut

bukan lagi seorang bawah umur. Mahkamah terpaksa mempertimbangkan dengan mengambil kira rangka berkanun yang diperuntukkan oleh Akta tersebut, bagaimana harta tersebut patut dibahagikan di antara kedua-dua pihak.

Diputuskan:

(1) Penentang adalah pihak yang telah membuat bayaran ansuran terhadap harta tersebut daripada punca kewangannya sendiri dan tidak pernah terdapat sebarang pembayaran balik oleh pempetisyen kepada penentang berkenaan dengan mana-mana sepuluh ansuran tersebut (lihat ms 41A–B).

(2) Memandangkan kekurangan keterangan mengenai sumbangan pempetisyen terhadap harta tersebut, maka harta tersebut telah diperolehi semasa perkahwinan tersebut melalui usaha tunggal penentang sahaja (lihat ms 41D–E).

(3) Mahkamah tidak mempunyai sebab untuk menolak penjelasan penentang bahawa separuh bahagian tak terbahagi harta tersebut yang sekarang ini didaftarkan dalam nama pempetisyen tidak bertujuan untuk dijadikan hadiah perkahwinan. Maka penegasan pempetisyen bahawa separuh daripada harta tersebut adalah bertujuan untuk dijadikan hadiah perkahwinan adalah salah dan tanpa merit memandangkan bahawa ianya tidak dipohon dalam petisyen (lihat ms 41F–H).

(4) Dalam apa keadaan sekalipun, jikalau mahkamah menerima hujahan pempetisyen, ianya masih tidak boleh mengetepikan budi bicara mahkamah, sama ada di bawah s 76(2) ataupun (4) Akta tersebut (lihat ms 42C).

(5) Di bawah s 76(4) Akta tersebut, jika didapati bahawa harta tersebut diperolehi melalui usaha tunggal penentang, maka ianya adalah mandatori bahawa mahkamah harus memberikan kepada penentang bahagian harta tersebut yang lebih besar. Dalam kes ini, pembahagian harta tersebut adalah ditentukan di bawah s 76(3) Akta tersebut, dan mahkamah tidak mempunyai budi bicara dan harus membuat pembahagian mengikut peruntukan s 76(4) Akta tersebut (lihat ms 43A–B). Oleh yang demikian, adalah jelas bahawa hak pempetisyen untuk pembahagian harta perkahwinan atau hasil jualan di bawah s 76(3) dan (4) Akta dari segi undang-undang tidak boleh sama rata atau lebih daripada hak penentang (lihat ms 43G–44C).

(6) Tidak kira keputusan mahkamah untuk memihak kepada penentang dengan bahagian yang lebih walaupun harta tersebut didaftarkan dalam nama bersama penentang dan pempetisyen sama rata, mengikut kepentingan keadilan, mahkamah masih boleh menggunakan budi bicaranya dalam rangka s 76(3) dan (4) Akta tersebut untuk mengesahkan pendaftaran status quo memandangkan konsesi yang dibuat oleh penentang (lihat ms 45G–H).

Per curiam:

(1) Semasa mengendalikan suatu permohonan di bawah s 76 Akta tersebut, adalah mustahak untuk mahkamah membuat keputusan fakta sama ada harta tersebut dibeli melalui usaha sama pempetisyen dan penentang, dan jikalau demikian, untuk memakai s 76(1) dan (2) Akta tersebut; ataupun sama ada harta tersebut diperolehi melalui usaha tunggal penentang, dan jikalau demikian, untuk memakai s 76(3) dan (4) Akta tersebut (lihat ms 40G–H).

(2) Adalah jelas bahawa jika mahkamah dikehendaki, dalam penggunaan kuasanya di bawah s 76(1) dan (3) Akta tersebut, untuk mengambil kira perkara-perkara dalam s 76(2) dan (4) Akta tersebut, maka fakta-fakta yang digunakan mesti dibekalkan dengan cukup teliti dalam Borang 2, kerana pihak yang bertentangan berhak mengetahui dengan tepat jenis kes yang dipohon yang terpaksa dihadapinya (lihat ms 42B).]

Notes

For cases on division of property and the extent of contribution by the wife, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2146–2147.

For a case on property amounting to a gift, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 2136.

For cases on claim for half share in the matrimonial home, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2134 & 2138.

Cases referred to

Cracknell v Cracknell [1971] P 356 (refd)
Heng Peng Hoo, Re [1989] 3 MLJ 103 (refd)
Hyman v Hyman [1929] AC 601 (folld)
Koh Kim Lan Angela v Choong Kian Haw [1994] 1 SLR 22 (refd)
Lee Yu Lan v Lim Thain Chye [1984] 1 MLJ 56 (refd)
Leake v Bruzzi [1974] 1 WLR 1528 (refd)
Wee Ah Lian v Teo Siak Weng [1992] 1 SLR 688 (folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 76
Divorce and Marriage Proceedings Rules 1980 rr 8, 56, Forms 2, 11

Tan Beng Hong (*BC Lim* with him) (*Tan Beng Hong & Co*) for the petitoner.

JA Yeoh (*Daphne Choy* with him) (*Shearn Delamore & Co*) for the respondent.

Vincent Ng J: In her divorce petition herein the petitioner prayed for an order under s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), that the respondent do transfer his half undivided share of the matrimonial home bearing address no 41, Changkat Tembaga, Island

Park, Penang ('the said property') to her; the other half undivided share of the title in the said property being already in her name. A

The respondent has in his answer, prayed that the said property be sold and the proceeds of the sale be divided in the proportion of 70% for himself and 30% for the petitioner.

The background of the case can be gleaned from the statement of agreed facts filed in court. Briefly, the facts are as follows. B

The petitioner and the respondent were married on 29 April 1975. Differences arose in the marriage and the parties were legally separated under an order for judicial separation dated 26 February 1979, on the grounds of the respondent's adultery. A divorce decree nisi was later granted by the High Court on 21 June 1990 under this petition and was made final and absolute on 21 September 1990. C

The said property was purchased by the respondent in December 1973 for a total purchase price of RM47,000. Subsequently on 3 February 1975, the respondent included the petitioner's name as co-owner jointly with him. The respondent then arranged for a loan of RM31,000 on the security of a legal charge over the said property in favour of Peninsula Finance Bhd and made the monthly repayments (mortgage instalments) towards its redemption. There was no serious challenge to the respondent's contention that he had, in addition to the initial down payments and the monthly mortgage instalment payments totalling RM55,603.86, expended a sum of RM20,458.98 on legal fees and assessments, fixtures and improvements and assorted movables. It is not disputed that the petitioner had since 1980 paid quit rents and assessments for the said property and had, in August 1990 — that is, after the said divorce decree nisi of 21 June 1990 — expended a sum of RM47,094.06 towards the redemption of the said property following action by Peninsula Mortgage Bhd to auction off the said property. D E F

It is common ground that the petitioner is a teacher, drawing a monthly salary of RM1,660 while the respondent is a race horse commentator on an income of RM5,250 per mensem — and also, the petitioner together with the child of the marriage have been in sole occupation of the said property since late 1977 and the child of the marriage is no longer a minor, having reached the age of majority in December 1994. G

When dealing with an application under s 76 of the Act, it is essential for this court to make a finding of fact on the question of whether the said property was acquired by the petitioner and the respondent during the marriage by their joint efforts, and if so, to apply s 76(1) and (2); or whether the said property was acquired by the respondent during the marriage by his sole effort, and if so, to apply s 76(3) and (4) of the Act. H

At the hearing before me, the petitioner maintained that she had made certain mortgage instalment payments in cash on the said property covered by ten receipts shown as exhs AB440–AB450 (item 10 in petitioner's bundle of documents) which were in her custody. She said that as she did not operate a current account in any bank; the mortgage instalments were paid by cheques drawn against the respondent's account, and though the receipts were in his name, they were in her custody because she had repaid him on those payments. She said that she had reimbursed the respondent I

A on the said instalments in cash within a few weeks of each payment. This was denied by the respondent who testified that all the said ten instalments were paid by him from his own funds and resources.

After carefully considering the oral evidence of both parties, the affidavits and the various exhibits in the two bundles of documents, I B accept and find that it was the respondent who paid the instalments on the property from his own funds and there had never been any reimbursement by the petitioner to the respondent in respect of any of the said ten instalments. I find no reason to accept the petitioner's testimony in this respect as she herself had admitted in court that she had never refunded the respondent in cash on every occasion that he paid the instalments but C only that she gave him cash whenever he needed it. Her evidence on this was vague and uncertain and in response to a query from the court, she admitted that the alleged financial assistance from the respondent was not related specifically to any of the mortgage instalments. It would appear to me that the main reason for the petitioner's claim concerning the said ten D instalments is because she had the original receipts in her possession. It is not uncommon for husbands to allow their wives to keep documents and receipts and the respondent's story that he had left it there when he moved out of the matrimonial home in a hurry is thus highly probable. Considering the dearth of evidence on any tangible contribution by her towards the acquisition of the said property, and her admission that save for the said E ten instalments, the quit rents and the said redemption sum paid by her, she had made no other financial contribution on the purchase of the house, I cannot but find that the said property was acquired during the marriage not by the joint efforts of the parties but by the sole effort of the respondent.

F Thus, the issue of the division of assets here would have to be determined within the purview of s 76(3), and the exercise of the court's powers thereunder, subject to the provision and in terms as stipulated in s 76(4) of the Act.

The further issue concerns the half undivided share of the said G property currently registered under her name. The petitioner had in her evidence contended that the respondent gave her a half share of the property as a wedding gift when they married on 29 April 1975, and hence instructed Peninsula Finance Bhd to include her name in the property; as a result, both of them became joint owners. During examination in court, the respondent denied that the half share of the matrimonial home was H intended to be a wedding gift. He said that the petitioner's name was only added in as a cost saving measure so as to obtain a government loan at 4% interest rate but the petitioner changed her mind later on and did not take up the government loan — and, that he had never addressed his mind to the implications of the property being registered in both names, although in his own words he agreed that, in the document of title, 'if it was half I share each it was ok by me.' There is no reason for the court to reject the respondent's explanation.

Be that as it may, I hold that the contention of the petitioner that the half share of the matrimonial home was intended as a wedding gift is misconceived and without merit, given that it was not pleaded in the petition (encl 1) and was only raised for the first time in the petitioner's

affidavit (encl 34 at p 3, para 7) in support of her summons in chambers (encl 32) to set aside an earlier consent judgment in respect of the said property. The contention of counsel for the petitioner that the form as prescribed for the petition under the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') does not provide for other matters to be raised, cannot be right as rr 8 and 56 of the Rules and Forms 2 and 11 therein are quite sufficient to enable the petitioner to raise any issue relevant to the division of matrimonial assets under s 76. Rule 8 states that a petition '... shall contain the information required by Form 2 ...' and para 13 of Form 2 requires the petitioner to '... set out the ground on which the relief is sought, and *in any case state with sufficient particularity the facts relied on ...*'. It is axiomatic that, if the court is required, in the exercise of its powers under s 76(1) and (3), to have regard to considerations under s 76(2) and (4), 'the facts relied on' have to be provided 'with sufficient particularity' in Form 2, as the opposite party is entitled to know the precise nature of the pleaded case that he or she would have to meet.

In any event, even if this court accepts the petitioner's assertion that the half share of the matrimonial home registered in her name was intended as a wedding gift, it nevertheless cannot displace the discretion of the court, be it under s 76(2) or 76(4) of the Act, having regard to the following:

(1) that s 76(1) and (3) conferring the power to order a division of any assets speak only of assets acquired during the marriage either by the joint efforts of the parties or by the sole effort of one party, the question of the parties' pre-determined positions either by way of registration or any spousal agreement is irrelevant;

(2) that the title to the matrimonial home in the joint names of the parties or otherwise and whether there is a presumption of advancement or otherwise is irrelevant for the purposes of s 76 and cannot preclude the court from exercising its discretion under s 76 (see also *Matrimonial Law in Singapore and Malaysia* by Tan Cheng Han (Butterworths)).

(3) the ratio in the judgment of the Singapore Court of Appeal in *Wee Ah Lian v Teo Siak Weng* [1992] 1 SLR 688 (which I shall adopt) where the court held at p 698, that: '... it is incumbent on the court to see that the provisions of the section are not violated when ordering a division of matrimonial assets following the granting of a decree of divorce, and the same would apply where the court's intervention is sought notwithstanding that the parties may have reached an agreement before seeking the court's intervention';

(4) the concluding remarks of Lord Hailsham LC in *Hyman v Hyman* [1929] AC 601 where he said at p 614, that '... the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction'. In my view, this approach should also be adopted with equal force in cases where the husband has covenanted.

A Consequently, it is just and essential that the court requires an applicant who comes before the court to seek a division of matrimonial assets under s 76 of the Act, to submit for the court's adjudication, the whole of the property or properties acquired during the marriage.

Section 76(4) specifically directs the court: '...; but *in any case* the B party by whose efforts the assets were acquired shall receive a greater proportion'. Thus, if the finding is that the said property (as I have so found) was acquired through the sole efforts of the respondent, it is mandatory that the court shall give him a greater proportion of the property to him.

C As I have held upon the facts in the instant case that the apportionment of property would have to be determined under s 76(3) of the Act, it would appear that the court may not have any discretion but to make the apportionment strictly in accordance with s 76(4) of the Act, if the following case authorities are of any indication, namely:

D (1) the judgment of the Singapore Court of Appeal in *Wee Ah Lian v Teo Siak Weng* [1992] 1 SLR 688 where the court held that it is incumbent on the court to see that these provisions of the section are not violated when ordering a division of matrimonial assets;

(ii) the judgment of the High Court in *Re Heng Peng Hoo* [1989] 3 MLJ 103 where Mohamed Dzaiddin J (as he then was) considered s 76(3) E and (4) to the exclusion of s 76(1) and (2) once it was established that the matrimonial property was not jointly acquired but was acquired by the sole effort of one party (note: in that case, the acknowledgement by the respondent husband that the petitioner wife had brought up and looked after their four children of the F marriage and had contributed to the welfare of their family was not sufficient to entitle the petitioner wife to a claim under s 76(1) of the Act);

(3) the judgment of the High Court in *Lee Yu Lan v Lim Thain Chye* [1984] 1 MLJ 56 where Peh Swee Chin J (as he then was) in allowing the petitioner wife one-third share of the proceeds of sale under s 76(4), G had nevertheless refused to entertain her claim for an additional sum out of the proceeds of sale to be put in a trust fund for the benefit of the minor children.

Accordingly, it would follow that the petitioner's entitlement to a share of the matrimonial home or the proceeds of sale under s 76(3) and (4) cannot H in law be equal or greater in proportion to the respondent's entitlement considering the following:

(1) that the contention that the half share of the matrimonial home already registered in the name of the petitioner whether as a wedding gift, or otherwise (even if true) is irrelevant for the purposes of I division of the matrimonial asset;

(2) that the matrimonial home was acquired during the marriage by the sole effort of the respondent in making the initial down payment and the monthly mortgage instalments from January 1975 to June 1983;

(3) that the marriage which took place on 29 April 1975 lasted barely three years and that accordingly, the contributions of the petitioner to the welfare of the family — essentially a one child family — cannot

displace the greater proportion to be accorded 'the party by whose effort the assets were acquired' (see *Koh Kim Lan Angela v Choong Kian Haw* [1994] 1 SLR 22 and *Re Heng Peng Hoo* [1989] 3 MLJ 103);

(4) that there were no needs of minor children to consider as the only child of the marriage had reached the age of majority in December 1994;

(5) that the petitioner's entitlement if at all, is only to credit for the whole or a portion (to be determined) of the sum of RM 47,094.06 paid by her towards redemption of the matrimonial home in August 1990, since the payment was made only after the order for judicial separation dated 26 February 1979 and the divorce decree nisi dated 21 June 1990 (note: in cases where one party had continued to pay the mortgage instalments after the separation, credit for half of the payment of the mortgage was provided for only because both parties had contributed to the purchase of the matrimonial home (see *Leake v Bruzzi* [1974] 1 WLR 1528 and *Cracknell v Cracknell* [1971] P 356)).

The only factors which the court has to consider under s 76(4)(a) of the Act, is 'the extent of contributions made by the party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family; ...'. Thus, the following factors, submitted by the petitioner's counsel, viz, the financial standing of the petitioner; the fact that the petitioner has no other assets; the fact that the respondent's earning potential is greater than the petitioner's; the fact that the petitioner has reached a maximum in the salary scale known as category DG6 and approaching the age of retirement; the fact that the petitioner is currently providing for the son's needs when the son is no longer a minor; and the fact that the petitioner has not sought substantial maintenance for herself; are totally irrelevant and outside the ambit of factors for consideration under s 76(4) of the Act. These factors are exhaustive and the court cannot take other factors into consideration.

Thus, strictly in accordance with the requirements under s 76(4) it would follow that the respondent should receive a greater proportion of the share or proceeds of sale, and upon the facts of the current case I would hold that the petitioner's share of the proceeds be limited to no more than one-third undivided share of the said property or of the proceeds of sale of the matrimonial home; a proportion which should cover adequately the petitioner's contribution generally, as a gainfully employed wife and mother, to the welfare of the family. As the aforementioned factors submitted by counsel are extraneous factors which ought not to be considered, a one-third share of the proceeds of sale of the matrimonial home would be a very fair and equitable apportionment, considering that a sum of only RM10,000 was awarded to the petitioner wife in *Re Heng Peng Hoo* [1989] 3 MLJ 103.

Furthermore, the court cannot give any greater weight or significance to the contributions of the petitioner considering the following:

(1) that the respondent's financial contributions to the matrimonial home in the region of some RM76,000 exceeded the payments made by the

petitioner and that in any event the respondent was not making a claim for a share of the moveable assets therein;

(2) that the quit rent and assessments paid by the petitioner since 1980 and the payment towards redemption of the matrimonial home after the order for judicial separation dated 26 February 1979 was made solely for the benefit and convenience of the petitioner;

(3) that the petitioner had the use of the matrimonial home for the past 18 years although the marriage lasted barely three years;

(4) that had it not been for the respondent's sole effort in purchasing the matrimonial home and maintaining the mortgage instalments from January 1975 to June 1983 there would have been no matrimonial home to save from auction sale;

(5) that in any event the contributions by the respondent exceeded the contributions post facto by the petitioner, in monetary terms as well as in real terms by reason of the purchasing power of the contributions made by the respondent between January 1975 to June 1983.

The argument on the part of counsel for the petitioner to seek a greater proportion on the basis of the respondent's conduct, namely his adultery and 'abandonment of matrimonial home and flagrant disregard for the welfare and interest of estranged spouse and child' is untenable in law for the following reasons:

(1) that the power of the court to order division of matrimonial assets under s 76 is subject and subject only to those considerations prescribed therein and that conduct of the parties is and has always been irrelevant;

(2) that even the power of the court to award damages for adultery against a co-respondent under s 58 of the Act, is qualified in that 'the award shall not include any exemplary or punitive element'.

(3) that following the order for judicial separation dated 26 February 1979, it shall no longer be obligatory for the petitioner to co-habit with the respondent and accordingly, the respondent was not legally obliged to continue with the mortgage payments although such payments were made until June 1983 (see s 64(2) of the Act).

Although the respondent is entitled to a greater proportion of the proceeds of sale under s 76(4), the respondent in his evidence volunteered that he is nonetheless prepared to accept an equality of division. Notwithstanding the decision of this court to favour the respondent with a greater proportion of the said property even though, in the title, the same is registered in the joint names of the petitioner and the respondent in equal shares, the court may still, in the interests of justice, exercise its discretion within the framework of s 76(3) and (4) to confirm such registered status quo, in view of the respondent's concession herein (see *Matrimonial Law in Singapore and Malaysia* by Tan Cheng Han (Butterworths)

This leaves me, finally, in determining the mode of execution of the order which I shall now make, to consider whether the court shall have regard only to the market value or price obtainable from the sale of the matrimonial home that is current at the date of the order for division as

and when made. It cannot be justified in the circumstances of the case or by current judicial practice to adopt the value as at the date of the divorce decree nisi or as at the date of redemption of the matrimonial home as contended by counsel for the petitioner. It is clearly provided in s 76 that this court may order *division or the sale* of matrimonial assets. Thus, a difficult question arises where the dispute between the husband and wife concerned a particular and singular property and the court holds that both are entitled to a share of same. In such an event, as the court would have no alternative but to order the sale of the property to a third party or by one party to the other, it can neither be sensible nor practical for the court to order that the property be sold at a price other than the current market price.

In any event, this issue was not seriously canvassed by counsel for the petitioner in his submission. Be that as it may, and considering with regret that this prayer for division of matrimonial assets had (on 4 September 1995) come up for hearing in this court only recently – that is over 16 years after the order for judicial separation and five years after the divorce decree nisi had been made absolute — while it is incumbent upon the petitioner, in her interests, to pursue her claim with vigour and to have this matter tried early.

I have held that the apportionment of the said property in favour of the petitioner vis-a-viz the respondent ought to be in the proportion of one third and two-thirds, whereas the respondent has acknowledged that he is prepared to accept equality of division of the said property, provided that no account is taken of the amount expended by the petitioner on the redemption of the said property. Nonetheless, it is this court's view that since the petitioner had saved the property from the 'auctioneer's hammer' when the then minor child of the marriage was staying with her, (though having acted partly in her own interests), it is only fair and equitable to order that the petitioner shall be entitled to a refund or credit of half of the amount of RM 47,094.06 expended by her in August 1990 on the redemption thereof.

I hereby order that the said property be divided between the petitioner and the respondent equally and that it be sold within three months from the date hereof at the current market value, to be determined by a reputable licensed valuer appointed by the SAR of the court — and that both parties hereto shall be at liberty to buy the other out of the half share of the said property; provided that if same shall be sold to third parties, the petitioner and respondent shall each partake in half share of the proceeds of its sale, after deduction of expenses to be incurred on the sale. It is also ordered that the petitioner shall be compensated to the extent of half of RM 47,094.06 expended by her in August 1990 on the redemption of the same. I would further order that in the event either party hereto refuses or fails to execute the transfer of the said property to the successful purchaser or to the opposite party (who has purchased) within 14 days of the conclusion of the sale, the SAR of the court shall be authorized to duly execute the relevant transfer.

I lastly order that each party shall bear his or her own costs of the current proceedings.

Order accordingly.

Reported by Lew Chee Seong